IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Consolidated Case Nos. 09-4348 & 10-4572

SUMMIT PETROLEUM CORPORATION,
Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and LISA JACKSON, Administrator

Respondents.

On Petition for Review of Final Action of the
United States Environmental Protection Agency

BRIEF FOR RESPONDENTS UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and LISA JACKSON, Administrator

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STATEMENT REGARDING ORAL ARGUMENT

Respondents United States Environmental Protection Agency and Lisa Jackson, Administrator, (collectively, "EPA") request oral argument. EPA believes oral argument would be useful to the Court.

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JURISDICTION

The Court has jurisdiction pursuant to section 307(b)(1) of the Clean Air Act ("CAA" or the "Act"), which provides in relevant part that "[a] petition for review of . . . any other final action of the Administrator under this chapter . . . which is locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit." 42 U.S.C. § 7607(b)(1). The determination contained in the October 18, 2010 letter is final agency action for purposes of section 307(b)(1) that is locally applicable only to the Petitioner's natural gas sweetening plant, sour gas production wells, and associated flares located in Rosebush, Michigan.

ISSUES PRESENTED FOR REVIEW

1. In the context of determining the scope of a "major source" of emissions pursuant to Title V of the Act, should the Court defer to EPA's reasonable, long-standing interpretation of its own regulatory phrase "located on one or more contiguous or adjacent properties," to allow for consideration of concepts in addition to physical distance?

2. Is EPA's determination that Petitioner's natural gas sweetening plant, sour gas production wells, and associated flares: (1) are under common control of Petitioner; (2) are located on one or more adjacent properties; and (3) belong to the

same major industrial grouping, and therefore constitute a single source under Title V of the Clean Air Act, arbitrary, capricious, or otherwise unlawful?

STATEMENT OF THE CASE

This case is a challenge by the operator of a natural gas sweetening facility to EPA's determination, as set forth in its final form in an October 18, 2010 letter, that the facility must obtain a CAA Title V permit due to its level of emissions of sulfur dioxide (SO_2) and nitrous oxides (NO_x). EPA's determination is based on analysis of evidence submitted by Petitioner showing that the operations of the natural gas sweetening plant, the sour gas production wells that provide gas to the plant, and associated flares within the gas fields connected to the plant are under the common control of Petitioner, are located on one or more adjacent properties and belong to the same major industrial grouping. Accordingly, pursuant to EPA regulations and Title V of the Act, the emissions from all these activities must be considered in the aggregate for purposes of determining whether the facility must obtain a Title V permit.

STATEMENT OF FACTS

I. STATUTORY AND REGULATORY BACKGROUND

The Clean Air Act, 42 U.S.C. §§ 7401-7671q, is intended to "protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." 42 U.S.C. § 7401(b)(1).

In 1990, Congress enacted Title V of the CAA, 42 U.S.C. §§ 7661-7661f, establishing an operating permit program covering stationary sources of air pollution. Under this program, all CAA requirements applicable to a particular source are set forth in a comprehensive permit, serving as "a source-specific bible for Clean Air Act compliance." Virginia v. EPA, 80 F.3d 869, 873 (4th Cir. 1996). The Title V program does not generally impose new substantive air quality control requirements; rather, sources of air pollution subject to Title V are required to obtain an operating permit that includes emission limitations, standards, monitoring requirements, compliance schedules, and other conditions necessary to assure compliance with the CAA. See 42 U.S.C. §§ 7661a(a), 7661c(a); Ohio Pub. Interest Research Group, Inc. v. Whitman, 386 F.3d 792, 793-94 (6th Cir. 2004).

A. Overview of the Title V Operating Permit Program

Congress designed the Title V permit program to be administered and enforced primarily by state and local air permitting authorities, subject to EPA oversight. See 42 U.S.C. § 7661a(d)(1). If a state fails to create an EPA-approved implementation plan, or in cases where an approved program is not being properly implemented, Congress requires EPA to "promulgate, administer, and enforce" a federal operating permit program. 42 U.S.C. §§ 7661a(d)(3), (i)(3). Further, in the absence of an EPA-approved tribal program, EPA may adopt a federal program. See 42 U.S.C. § 7601(d)(4). 40 C.F.R. part 71 sets forth a comprehensive federal

permit program consistent with the requirements of Title V and defines the procedures pursuant to which EPA will issue Title V permits in lieu of an approved-state or tribal program. EPA operates a federal permitting program in "Indian country," as that term is defined by the regulation, where EPA has not explicitly approved an operating permit program meeting the requirements of 40 C.F.R. part 70 for Indian country. 40 C.F.R. § 71.4(b). EPA approval of Michigan's Title V permit program unambiguously excludes Indian country.[1]

B. Definition of a Major Source

Title V of the Act requires every major source of air pollution to obtain an operating permit. 42 U.S.C. § 7661a(a). The statute provides that a "major source" under Title V may be a stationary source or "any group of stationary sources located within a contiguous area and under common control" that meets: (1) the definition of "major source" provided in section 112 of the Act (42 U.S.C. § 7412); (2) the definition of "major stationary source" provided in section 302(j) of

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[1] 61 Fed. Reg. 32,391, 32,392 (June 24, 1996) ("Because MDEQ has not demonstrated, consistent with applicable principles of Indian law and Federal Indian policies, legal authority to regulate sources on tribal lands, the proposed interim approval of Michigan's operating permits program will not extend to lands within the exterior boundaries of any Indian reservation in the State of Michigan."); 73 Fed. Reg. 53,366 (Sept. 16, 2008) ("Michigan is not authorized to carry out its Federally approved air program in 'Indian Country,' as defined in 18 U.S.C. 1151.").

the Act (42 U.S.C. § 7602(j)); or (3) the definition of "major stationary source" provided in part D of Title I of the Act (42 U.S.C. §§ 7501-15). 42 U.S.C. § 7661(2). The relevant portions of the Clean Air Act, section 112, section 302(j), and part D of Title I, each contain a distinct definition of major source or major stationary source that applies to different categories of pollutants. EPA's interpretation of a "major source" under Title V is embodied in its Title V federal operating permit program regulation, and in large part directly incorporates the statutory definition. 40 C.F.R. § 71.2.[2] The definition of major source includes any stationary source (or group of stationary sources meeting other regulatory criteria) that directly emits or has the potential to emit 100 tons per year of any pollutant subject to regulation, which, as relevant here, includes nitrous oxides and sulfur dioxides. See 42 U.S.C. § 7602(j); 40 C.F.R. § 71.2. A stationary source is defined as "any building, structure, facility, or installation that emits or may emit any regulated air pollutant." 40 C.F.R. § 71.2.

As provided for by Title V and EPA's corresponding implementing regulation, EPA may conclude, based on the specific facts under consideration, that a group of stationary sources constitute the relevant "source" for Title V

[2] The source definitions in part 71, the federal Title V operating permits program, mirror the definitions in part 70, which sets forth minimum requirements for state Title V operating permit programs. See 40 C.F.R. § 70.2.

permitting purposes, and take into consideration emissions activities from that group of sources in determining whether that source is major. 40 C.F.R. § 71.2. EPA considers three regulatory criteria in analyzing whether a group of emissions activities constitute a single source for permitting purposes: (1) whether the activities are under the common control of the same person (or persons under common control); (2) whether the activities are located on one or more contiguous or adjacent properties; and (3) whether the activities belong to a single major industrial grouping.[3] 40 C.F.R. § 71.2. The terms "common control," "contiguous," and "adjacent" are not defined within the regulation.

By 1990, when Title V was added to the Act, EPA had a long history of interpreting the terms "common control," "contiguous," and "adjacent" in the context of applicability determinations under the New Source Review (NSR) and Prevention of Significant Deterioration (PSD) permitting programs. The current regulatory definition of a "stationary source" applicable in the NSR and PSD programs was promulgated in 1980, following the D.C. Circuit's decision in Alabama Power v. Costle, 636 F.2d 323 (1979), which rejected EPA's prior

[3] A group of stationary sources belong to a single major industrial grouping if they have the same two-digit Standard Industrial Classification (SIC) code. 40 C.F.R. § 71.2. The SIC is a United States government system for classifying industries by a four-digit code based on the type of activity in which they are primarily engaged. The SIC manual is available at http://www.osha.gov/pls/imis/sic_manual.html.

definition of a stationary source. In the preamble to the 1980 final rules, EPA explained:

> the December opinion of the court in Alabama Power sets the following boundaries on the definition for PSD purposes of the component terms of "source": (1) it must carry out reasonably the purposes of PSD; (2) it must approximate a common sense notion of a "plant;" (3) it must avoid aggregating pollutant-emitting activities that as a group would not fit within the ordinary meaning of "building," "structure," "facility," or "installation."

45 Fed. Reg. 52,676, 52,694-95 (Aug. 7, 1980).

Consistent with that understanding, EPA rejected the proposed definition that used the concepts of proximity and control as the sole criteria for aggregating pollutant-emitting activities, concluding that the "definition would fail to approximate a common sense notion of 'plant,' since in a significant number of cases it would group activities that ordinarily would be regarded as separate." 45 Fed. Reg. at 52,695/1. To remedy that concern, EPA incorporated an additional criterion based on a Standard Industrial Classification (SIC) code in order to distinguish among activities on the basis of their functional interrelationships. Id. The categorical groupings provided in the SIC code were considered narrow enough to distinguish separate sets of emissions activities into common sense groupings; at the same time the categories were broad enough to "minimize the likelihood of artificially dividing a set of activities that does constitute a 'plant' into more than one group." Id. EPA recognized that case-specific analysis would

be necessary to determine whether certain pollutant emitting activities met the common sense notion of a plant. Accordingly, EPA expressly declined to adopt a specific physical distance beyond which emissions activities would be considered separate sources. 45 Fed. Reg. at 52,695/3 ("EPA is unable to say precisely at this point how far apart activities must be in order to be treated separately. The Agency can answer that question only through case-by-case determinations."). Following promulgation of the 1980 rule, a substantial practice of interpreting the terms "common control," "contiguous," and "adjacent" developed through fact-specific inquiry. See generally, EPA Region 7 Air Program "NSR Policy and Guidance Database" at http://www.epa.gov/region7/air/nsr/nsrindex.htm (listing, *inter alia*, source determinations and guidance letters).

Against this backdrop, EPA promulgated a definition of "major source" under Title V incorporating three criteria that must be met to aggregate stationary sources that are nearly identical to those provided in the definition of "building," "structure," "facility," or "installation" adopted in the 1980 final PSD rules. Compare 40 C.F.R. § 52.21(b)(6) to 40 C.F.R. § 71.2. The proposed and final versions of the parts 70 and 71 rules made clear that the application of the Title V source definition was to be consistent with that of the NSR/PSD permitting

program.[4] While EPA did not discuss the criteria at length in its proposed or final part 70 or part 71 Title V implementing regulations, EPA addressed its historic practice interpreting the meaning of "contiguous" or "adjacent" property in the preamble to proposed general provisions for regulated hazardous air pollutants ("HAPs"), which preamble was also issued in the early 1990s. In that preamble, EPA considered three options for defining the term "source" that would apply under the general provisions for national emission standards for HAPs (42 U.S.C. § 7412), including the option to model the definition from the definitions of "stationary source" and "major source" applied in the Title V context:

> The permit program regulation defines major source to include certain sources "on contiguous or adjacent property" in order to be consistent with language used in analogous provisions in previous Agency regulations (e.g., those dealing with the Prevention of Significant Deterioration and Nonattainment New Source Review permitting programs developed pursuant to parts C and D of title I of the Act…) Although "contiguous" is clear in its meaning of actually touching,

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[4] See 56 Fed. Reg. 21,712, 21,724/3 (May 10, 1991) (proposed part 70 rule) ("The legislative history reference therefore suggests that aggregation by SIC code should be done in a manner consistent with established NSR procedures"); 57 Fed. Reg. 32,250, 32,252/3 (July 21, 1992) (final part 70 rule) ("A major source is defined in terms of all emissions units under common control at the same plant site (i.e., within a contiguous area in the same major group, two-digit, industrial classification)."); 60 Fed. Reg. 20,804, 20,806/3 (Apr. 27, 1995) (proposed part 71 rule) ("The EPA is proposing to utilize the same approaches to defining "major source" as were used for 40 CFR parts 63 and 70…"); 61 Fed. Reg. 34,202, 34,206/2 (July 1, 1996) (final part 71 rule) ("For purposes of determining applicability, a source's total emissions of a pollutant are found by summing the potential emissions of that pollutant from all emissions units under common control at the same plant site.").

> "adjacent" is subject to broader interpretation, including that of being nearby but "not touching." What is "adjacent" depends not only on physical distance, but on related issues arising from the type of nexus existing between facilities. In ambiguous situations, the EPA prefers to make determinations of whether various industrial operations are part of the same source on a case-by-case basis based on implementation experience and common sense. For these reasons, the EPA has chosen not to include a single, inflexible definition of "contiguous or adjacent property" (or "contiguous area") in its regulations, including these general provisions for part 63.

58 Fed. Reg. 42,760, 42,767/1 (Aug. 11, 1993).[5]

In sum, EPA has not established a specific distance or geographic limit to gauge whether properties are sufficiently "adjacent" to constitute a single source under Title V. Instead, EPA interprets the definition of major source under Title V, as it has consistently done in similar contexts under other CAA programs, to require the aggregation of "all emissions units under common control at the same plant site" and applies the three regulatory factors in light of the specific factual circumstances to determine the scope of the source. 61 Fed. Reg. at 34,206.

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[5] EPA ultimately chose a different approach to defining a source for HAPs purposes than the approach to defining a source for non-HAPs pollutants under Title V. See infra §II.B. EPA did not provide a single, inflexible definition of a "contiguous area" in its HAPs regulations, but instead adopted definitions of source units (e.g., "facility" or "plant site") that apply to particular categories of sources. In some cases, the definition of a source unit applicable to particular operations under the HAPs regulations is narrower than the general definition of a "source." See infra, p.41 n.16.

C. Determination of Applicability of Title V

An owner or operator of a source may submit a written request to EPA for a "determination of applicability" of Title V requirements to that source. 40 C.F.R. § 71.3(e). In response to such requests, as well as similar applicability requests made under the NSR/PSD permitting program, EPA has issued numerous determinations, or letters providing guidance to other permitting authorities making such determinations, that interpret and apply EPA's definition of a major source to the specific facts of that permitting action.[6]

EPA has issued non-binding guidance to assist permitting authorities in making major stationary source determinations for the oil and gas industries that emphasize the case-by-case nature of these determinations. On January 12, 2007, EPA Acting Assistant Administrator William Wehrum issued a guidance memorandum entitled "Source Determinations for Oil and Gas Industries" ("Wehrum Memorandum"). J.A. 33. The Wehrum Memorandum reiterated that the "foremost principle" guiding source determinations under either NSR or Title V definitions is to apply "'a common sense notion' of a plant." J.A. 34. It further noted that EPA has historically used such factors as operational dependence and

[6] Many of the guidance letters and EPA determinations are available publicly in the EPA Region 7 Air Program "Title V Policy & Guidance Database" at http://www.epa.gov/region07/air/title5/t5index.htm, and the "NSR Policy & Guidance Database" at http://www.epa.gov/region7/air/nsr/nsrindex.htm.

proximity to inform the analysis of whether two properties are contiguous or adjacent. J.A. 35. The Wehrum Memorandum suggested that, in the context of the oil and gas industry, whether two activities are operationally dependent should not drive the determination as to whether properties are contiguous or adjacent because such analysis "would potentially lead to results which do not adhere to the common sense notion of a plant." J.A. 35. The Wehrum Memorandum nonetheless concluded, while the guidance offered "a reasonable analytic approach" to simplify the determination process, whether or not a permitting authority should aggregate two or more pollutant-emitting activities into a single major source "remains a case-by-case decision considering the factors relevant to the specific circumstances." J.A. 37. The Wehrum Memorandum did not purport to preclude consideration of operational dependence in the determination process, noting that "unique factors such as proximity and interdependence" could result in aggregation of emissions activities not located on a single surface site. J.A. 37, n.17.

The Wehrum Memorandum was formally withdrawn and replaced by subsequent guidance in the September 22, 2009 memorandum entitled "Withdrawal of Source Determinations for Oil and Gas Industries" from Gina McCarthy to Regional Administrators. ("McCarthy Memorandum"). J.A. 55. The McCarthy Memorandum explained that the prior Wehrum Memorandum had

attempted to simplify the source determinations analysis in the oil and gas industry by focusing on whether activities are "contiguous" or "adjacent" with an emphasis on their proximity. The McCarthy Memorandum concluded that, although a permitting authority ultimately retained the discretion to decide that proximity serves as the "overwhelming factor" in a particular determination, the simplified methodology would not provide for the "close[] examination of all three criteria" in the NSR and Title V regulations required to arrive at a reasoned decision. J.A. 55, 56. Instead, the McCarthy Memorandum emphasized that source determinations should "rely foremost" on the application of the three regulatory criteria, and explained that in applying those criteria to their fact-specific decisions, permitting authorities could look to the explanations provided in the 1980 final PSD Rule preamble and the reasoned decision-making found in EPA Regional Offices' application of the criteria in prior determinations and guidance documents. J.A. 56. Like the Wehrum Memorandum, the McCarthy Memorandum reiterated the case-by-case nature of source determinations: "while informative of the necessary analytic process, no single determination can serve as adequate justification for how to treat any other source determination for pollution-emitting activities with different fact-circumstances." J.A. 56.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Summit's Rosebush Facility

Petitioner, Summit Petroleum Corporation ("Summit") is the operator of a natural gas sweetening plant located at 4725 N. Isabella Road, Rosebush, Michigan.[7] J.A. 13. The natural gas that is processed by the sweetening plant is supplied by approximately 100 gas production wells from three well fields that surround the plant. Id. Summit owns and operates these gas production wells, the pipeline connecting the wells to the sweetening plant, and the flares and pumping equipment associated with the sweetening plant operations. Id.; J.A. 102. Summit does not, however, own the property or surface rights to property located between the well sites. J.A. 102.

The gas production wells supply gas exclusively to the Rosebush plant; likewise, the Rosebush plant receives gas only from the gas production wells surrounding the plant. J.A. 39-40. The gas production wells are physically connected to the sweetening plant by a "collection system," with flares interspaced

[7] Natural gas is considered "sour" if it contains certain amounts of hydrogen sulfide. "Sweetening" is the process of removing the hydrogen sulfide so that the gas can be used.

between the wells and the collection system.[8] Id. The closest gas production well is 500 feet from the sweetening plant, while the furthest well is approximately eight miles away. J.A. 127, 129. More than a dozen wells are located within a one mile radius from the sweetening plant. J.A. 127. The closest flare is about 3000 feet from the sweetening plant (a little more than a half mile in distance). J.A. 100.

The operation of the sweetening plant, the gas production wells and flares emit, and have the potential to emit, sulfur dioxides and nitrous oxides in various amounts. J.A. 128, 129. While the operation of the sweetening plant alone emits, or has the potential to emit, just under 100 tons per year of sulfur dioxides and nitrous oxides, the potential emissions of the plant, the wells, and the flares in combination exceed 100 tons per year of both pollutants. Id. Even if emissions from only one sour gas production well is taken into account, the emissions from that well in conjunction with the emissions from the sweetening plant exceeds 100 tons per year of sulfur dioxide. J.A. 129.

The sweetening plant and the majority, but not all, of the gas production wells and flares are located within the boundary of the Saginaw Chippewa Indian Tribe's Isabella Reservation. J.A. 130.

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[8] Flares work as part of a plant operations by burning off waste natural gas, and serving as a part of a safety system to burn off gas to relieve pressure on the gas collection equipment.

B. EPA's Title V Applicability Determination

EPA action in this matter was initiated in January 2005 by a request from the Michigan Department of Environmental Quality ("MDEQ") and Summit for a determination of the applicability of Title V to Summit's gas sweetening plant operations located in Rosebush, Michigan. J.A. 13. The letter indicated that emissions from either Summit's natural gas sweetening plant or its sour production wells, on their own, did not meet the definition of a Title V major source, but that if these emissions sources were aggregated, they would be considered a major source for nitrogen oxide and sulfur dioxides. Id. The letter noted that the definition of a "major source" for hazardous air pollutants under Michigan's Title V operating permit program includes an explicit exemption for emissions from an oil or gas production or exploration well and its associated equipment—whether or not such units are in a contiguous area or under common control.[9] In contrast, the definition of "major source" for non-HAPs pollutants does not include the same exception. J.A. 14. In light of these definitions, MDEQ and Summit requested a determination from EPA as to whether the sweetening plant and its production

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[9] The definition is set forth in Article II, Part 55, Air Pollution Control, of the Michigan Natural Resources and Environmental Protection Act, 1994 PA 451 (as amended) and in Mich. Admin. Code R. 336.1211(1)(a)(i)(C) (Rule 211).

wells should be aggregated under the definition of "major source" based on its emissions of nitrogen oxide and sulfur dioxides. Id.

EPA responded to the request in a letter dated April 26, 2007. J.A. 29. EPA concluded that it could not make a determination on the basis of the information included in the initial request. Id. However, EPA provided Summit with guidance as to how such a determination is made, attached the Wehrum Memorandum, and requested further information necessary to complete a determination. J.A. 30-31, 33. In response to the question regarding the definition of a major source of hazardous air pollutants, EPA cited to the definition of "major source" under 40 C.F.R. part 70 and part 71 and explained that each of the subsections of that definition "provides a different test for Title V applicability," and EPA must apply the test relevant to the particular pollutant at issue. Finally, EPA informed Summit that, based on its understanding that the plant and sour gas wells are located within the Saginaw Chippewa Tribe's Isabella Reservation, EPA would be the permitting authority. J.A. 31-32.

By letter on April 18, 2008, Summit responded with the additional information, including maps, information on the potential to emit from emission units, and a schematic of the plant operations. J.A. 38-47. Summit also argued that none of the production wells is in close proximity to the sweetening plant and it would therefore not be appropriate to aggregate these emission activities into a

single source. J.A. 41. EPA replied by letter on April 16, 2009, pointing out certain deficiencies in the supplemental information and requesting further explanation. J.A. 48-49. In the letter, EPA addressed in turn the various arguments Summit had raised in support of its position that its operations should not be treated as a single source for purposes of Title V. J.A. 49-50. EPA again stated that the definition of a "facility" that applies to HAPs under 40 C.F.R. Part 63, subpart HH is irrelevant to a determination to aggregate nitrogen oxide and sulfur dioxide emissions from a group of sources under Title V. J.A. 50. EPA also responded to Summit's argument that the wells and plant are too far apart to be considered "adjacent." EPA emphasized that whether sources are considered "adjacent" is evaluated not only with respect to physical distance but may also take into account the functional interrelationship of the facilities. Id. Finally, EPA again concluded Summit had failed to provide the necessary information about its operations and emissions to issue a final Title V determination. J.A. 50-51.

By conference call on July 17, 2009, EPA obtained further clarification of the materials provided by Summit. J.A. 52. On September 8, 2009, EPA issued its determination that Summit's sweetening plant and sour gas wells constitute a single source for the purposes of permitting under Title V, cited to the analysis of the three regulatory criteria contained in the April 26, 2007 and April 16, 2009 letters, and required Summit to complete a permit application within 12 months.

J.A. 53. Shortly thereafter, on September 22, 2009, the McCarthy Memorandum withdrew the Wehrum Memorandum.

Summit filed a petition for review of the September 8 letter on November 4, 2009. (Case No. 09-4348). J.A. 1. However, Summit requested an administrative stay of the effect of the September 8 letter, and on February 23, 2010, EPA granted the administrative stay in order to complete further administrative process, including receipt of supplemental information from Summit. The parties filed a joint motion for abeyance, which the Court granted on March 18, 2010. On May 3, 2010, EPA received supplemental information from Summit regarding its operations at the Rosebush facility, including certification of previously submitted data, maps depicting the location of each emission source and its corresponding emission levels of nitrogen oxides and sulfur dioxide, and corrections of certain discrepancies in the originally submitted information. J.A. 100-102. EPA extended the administrative stay of the September 8 letter to allow additional time for review of this information.

On October 18, 2010, EPA issued a letter to Summit that represents the culmination of the agency's decision-making process. J.A. 86-93. In the letter, EPA explained its analysis of the information submitted by Summit, set forth a factor-by-factor application of the three regulatory criteria to Summit's emissions sources, and finally directed Summit to submit a Title V permit application to

Region 5 by April 15, 2011. EPA considered the additional information submitted by Summit in support of its view that the sour gas wells, sweetening plant, and associated flares are not located on adjacent properties, but ultimately concluded that the information did not require a change from its initial determination that these emission sources constitute a single source for purposes of permitting under Title V of the Clean Air Act.

In the letter, EPA explained that its determination was guided by the McCarthy Memorandum, and accordingly addressed each of the three regulatory factors in turn. Under its analysis of whether Summit's emissions activities are "located on contiguous or adjacent properties," EPA also explained that it has never established a specific distance between pollutant emitting activities for determining whether two non-contiguous facilities are adjacent, but that historically the term has been interpreted to include concepts such as "the nature of the relationship between facilities" and the "degree of interdependence between them," in addition to physical distance. J.A. 89. Thus, distance is "important" but not a "deciding factor." J.A. 90. Following this explanation, EPA proceeded to consider the distances at issue among the various wells, flares, and the natural gas sweetening plant. EPA noted, for example, the distances of the furthest production well and flare from the sweetening plant, as well as the fact that a dozen or more sour gas wells are located within a one-mile radius. J.A. 90-91, n.21. EPA then

discussed the relationship between these emissions activities, observing that all three gas fields are connected to the plant through one "collection system." J.A. 91. Further, the interconnected wells, flares, and plant "together produce a single product." Id. EPA noted that Summit had failed to provide any evidence to demonstrate that the emissions sources are not "truly interdependent." Id. As EPA explained, "the wells provide all their sour gas to the sweetening plant, the sour gas cannot flow anywhere else, and Summit owns and operates the sweetening plant and well sites." Id. In light of these various considerations, EPA rejected Summit's arguments that the distance or intervening properties between the plant, wells, and flares require the conclusion that its operations do not fit the common sense notion of a plant. EPA instead concluded that given the interdependent nature of the natural gas production facilities, "they should not be considered separate emission sources." Id.

Summit filed a Petition for Review of the October 18, 2010 letter (Case No. 10-4572). J.A. 81-99. Summit sought, and the Court granted, leave to consolidate Case Nos. 09-4348 and 10-4572.

American Petroleum Institute ("API") sought leave to intervene in the consolidated case on January 14, 2011. EPA opposed the intervention, and the Court denied the motion to intervene in its Order of April 7, 2011. American

Exploration and Production Council ("AXPC") and API then each sought leave to submit amicus briefs, which EPA did not oppose.[10]

STANDARD OF REVIEW

This Court's review is governed by the deferential standard set forth in the Administrative Procedure Act, under which agency action is valid unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). This standard "is a narrow one," under which the Court is not "to substitute its judgment for that of the agency." Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971). An agency need only "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts and the choice made." Nat'l Cotton Council of Am. v. EPA, 553 F.3d 927, 934 (6th Cir. 2009) cert. denied, 130 S. Ct. 1505 (2010) (quoting Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983)).

Judicial deference also extends to EPA's interpretation of a statute it administers. United States v. Mead Corp., 533 U.S. 218, 226-27 (2001); Chevron U.S.A. Inc. v. NRDC, 467 U.S. 837, 842-45 (1984). EPA's interpretation of its

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[10] Both API and AXPC are national trade associations representing members of the American oil and natural gas industry, and oppose EPA's October 18, 2010 determination that Summit's operations constitute a major source under Title V.

own regulations is entitled to even more deference. Both the Supreme Court and this Court have long recognized that an agency's interpretation of its own regulations is to be given "controlling" weight unless "plainly erroneous or inconsistent with the regulation." Auer v. Robbins, 519 U.S. 452, 461 (1997) (internal quotation and citation omitted); Kentucky Res. Council v. EPA, 467 F.3d 986, 993-94 (6th Cir. 2006); National-Southwire Aluminum Co. v. EPA, 838 F.2d 835, 838 (6th Cir. 1988).

Thus, insofar as this case concerns EPA's interpretation and application of its own regulatory terms "located on one or more contiguous or adjacent properties," EPA's interpretation and application of those terms must be given considerable deference.

SUMMARY OF ARGUMENT

Summit and Amici challenge EPA's determination that the operations of the natural gas sweetening plant, the sour gas production wells that provide gas to the plant, and associated flares between the wells and the plant constitute a single source on essentially one ground – the distances between these units, they argue, are just too great to meet the definition of a single major source. Although neither the plain dictionary definition, nor EPA's historic interpretation of the relevant regulatory terms, compels reading a specific physical distance as the outer limits of "adjacency" in this context, Summit insists that such limits can be inferred from

other provisions of the Clean Air Act, state regulatory provisions, or non-binding guidance. None of the authorities relied upon either purport to or have the effect of incorporating specific physical or geographical limits into the major source definition.

EPA's interpretation of the definition of a "major source" of air pollution implicates its expertise and reasoned discretion in determining the scope of plant operations that trigger regulatory obligations under Title V and other sections of the Clean Air Act and should be accorded considerable deference here. The definition of "major source" was drawn up broadly enough to allow EPA to apply it meaningfully across an enormous diversity of industry practices and kinds of emission sources while maintaining some level of consistency across the entire permitting program; to require interpretation of the definition with the specific distance limits Summit urges must apply would undercut EPA's ability to respond to the particular factual circumstances of those greatly varying sources within nationwide permitting programs.

Once it is conceded that neither the Clean Air Act nor the applicable regulations contains some absolute physical or geographic limitation to the scope of a major source, there is little left to challenge in EPA's source determination. Summit's sweetening plant, gas wells, and flares, which work together as a single, physically interconnected system to produce saleable gas, are exactly the kind of

operations that meet a common sense notion of "plant" and therefore meet the definition of a single source. See Alabama Power, 636 F.2d at 397 ("Congress clearly envisioned that entire plants could be considered to be single sources."). Summit concedes that two of the three regulatory criteria relied upon in EPA's source determination support a finding that the sweetening plant and other emissions activities are a single source. EPA's determination that Summit's gas sweetening plant and other interdependent emission sources, which are located from 500 feet to roughly eight miles from the main plant, are "located on one or more adjacent properties" comports with EPA's historic interpretation of the definition of a major source in its Title V and PSD/NSR implementing regulations, current EPA guidance, and the practice of permitting authorities making such source determinations in similar factual circumstances.

ARGUMENT

I. EPA'S CONSTRUCTION OF "ADJACENT" IS CONSISTENT WITH THE CLEAN AIR ACT AND COMMON SENSE.

A. EPA's interpretation of the term adjacent as applied to Summit's operations comports with its dictionary definition.

Petitioner and Amici argue that EPA's interpretation of the term adjacent, as applied to Summit's Rosebush operations, is plainly erroneous or inconsistent with EPA's Title V regulation and therefore not entitled to deference. Pet'r Br. at 26-27; API Br. at 16-17; AXPC Br. at 11-13. These arguments boil down to one

flawed premise: in Petitioners' view, the term "adjacent" can *only* be defined by reference to concepts of physical distance. The plain dictionary definition of adjacent contains no such absolute prohibition. To the contrary, to have contextual meaning, adjacency *must* be evaluated by reference to some concept in addition to distance. Moreover, as the term is applied here—to determine whether different emissions activities constitute a single source of air pollution under the Clean Air Act— it is entirely reasonable for EPA to consider how the emissions activities interact in addition to their physical locations in deciding whether the activities are "close" or "proximate" enough to be considered a single plant site.

Summit and Amici state, and EPA agrees, that the ordinary dictionary definition of "adjacent" is for one thing to be "close" or "proximate" to another. Pet'r Br. at 26 ("close to; lying near, next to; adjoining"); API Br. at 16 ("near of close (*to* something)"); AXPC Br. at 10 ("[l]ying near or close to"). Summit and Amici then argue, illogically, that the only relevant information to determining whether one thing is "close" or "proximate" to another is physical distance. Clearly, distance alone does not answer the question of whether two objects are close to one another: are two properties separated by one mile "close" to one another? A second question must be asked to arrive at a conclusion: for what purpose? A distance of one mile between two properties may be considered sufficiently small to be close to each other if one is driving between them; not so if

one is trying to throw a softball from one to the other. It is only by examining the relative context that a reasonable determination can be made as to whether two objects are "close" or "proximate" to one another. It is common sense that the inquiry into "adjacency" cannot stop at exclusively physical distance or geography. See generally, United States v. St. Anthony R. Co., 192 U.S. 524, 530 (1904) ("[Adjacency] must be defined with reference to the context, at least to some extent.").

Based on the mistaken premise that the term "adjacent" unambiguously refers solely to physical proximity, Summit and Amici argue that EPA inappropriately considered the functional interrelationship or interdependence between the sweetening plant, the gas wells, and the associated flares in determining that these emissions activities are located on adjacent properties. To the contrary, it is entirely reasonable to examine the context – i.e., the relationship between the different emissions activities – in order to decide if they are "close" enough to constitute a single major source of pollutants. In promulgating the definition of a source, EPA has clearly articulated that the three regulatory criteria, including the "contiguous or adjacent" factor, are applied such that emissions activities that meet a common sense notion of a plant are treated as a single source under Title V. 45 Fed Reg. at 52,694-95; 61 Fed. Reg. at 34,206. Here, EPA has done exactly that, considering the distances, the physical linkages, and the

operational interdependence of Summit's different emissions units in order to determine that these units are located on adjacent properties that constitute a single plant site. J.A. at 90-91. Each of these factors reasonably informs an analysis of whether a series of different emissions sources are "close" to one another.

B. As construed under the Clean Air Act, a group of sources located on "adjacent properties" readily encompasses sources separated by the distances at issue here.

In a similar vein, Summit and Amici contend that the term "adjacent" is unambiguous, or at least is not ambiguous enough to reasonably be interpreted to mean separated by many miles. Pet'r Br. at 26; API Br. at 16; AXPC Br. at 11, n.5. Summit acknowledges that EPA has never "established a specific distance to gauge whether facilities are separate or adjacent." Pet'r Br. at 22. Nonetheless, Summit and Amici argue the distances at issue here, which range from 500 feet to roughly eight miles from the main sweetening plant, are simply too far to be considered "adjacent." Summit and Amici fail to address the context in which the term "adjacent" is being applied. In the context of defining the scope of industrial operations that constitute a source of air pollution, the phrase "located on one or more contiguous or adjacent properties" does not inherently contain the rigid physical limits Summit and Amici seek to place on it.

In certain contexts, the term "adjacent" may contain some absolute distance or geographical limitation beyond which two objects are no longer considered

"adjacent." However, EPA is not interpreting the term "adjacent" here in the narrowly defined context relied upon by APXC; adjacent here does not refer to whether a personal injury accident occurred "upon sidewalks, ways, or premises immediately adjacent" to a property. Long v. London Lancashire Indem. Co. of Am., 119 F.2d 628, 629 (6th Cir. 1941). AXPC Br. at 11. Nor is adjacency in the air pollution context readily comparable to the concept of adjacency applied in other environmental regulatory regimes. Id. In the context of Title V of the Clean Air Act, EPA is construing the term "adjacent" to define a source of air pollution, where the source emits pollution "into the ambient air which offers a broader geographic area than a waterway." H.R. Rep. No. 101-490, pt. 1 at 342 (1990), reprinted in 2 Legislative History of the Clean Air Act Amendments of 1990 at 3366 ("Legislative History") (Comm. Print 1993) (Although "[Title V] is patterned generally after the permit program for point sources of water pollution under the Clean Water Act," Title V has a broader geographic scope – "particularly [] in light of the new definitions of 'major sources'. . . ."). Moreover, EPA must apply the term adjacent across industries with widely divergent practices in locating equipment and emissions units that would commonly be considered as a single plant. Compare "Statement of Basis of the Terms and Conditions for Permit No. 169TVPO1:BP Exploration (Alaska) Inc., Hot Water Plant" ("BP Permit"), J.A. 151 (analyzing oil production operations covering 300 square miles) to "Analysis

of the Applicability of Prevention of Significant Deterioration (PSD) to the Anheuser-Busch, Incorporated Brewery and Nutri-Turf, Incorporated at Fort Collins, Colorado," J.A. 131 (analyzing brewery operations 6 miles apart). Even within the same industry, the same kind of plant may cover a larger or smaller area—and accordingly, the exact same kinds of emissions units may be separated by varying distances at plant sites within the same industry. See e.g., BP Permit, J.A. 150 (distances between emission points vary from 3 to 9 miles at different oil production sites). In this context, EPA may reasonably interpret the phrase "located on one or more contiguous or adjacent properties" to encompass emissions activities separated by miles.

Importantly, this Court need not address what, if any, outer physical or geographic limits exist in EPA's definition of a major source; it need only decide whether EPA was clearly erroneous in the application of that regulation to the facts here. As applied to plant operations that vary enormously across the different industries regulated by the Clean Air Act, it is *at minimum* ambiguous as to whether emissions units that are part of an integrated industrial operation and located 500 feet to roughly eight miles apart may be considered to be located on "adjacent" properties such that they may be deemed a single plant site. Petitioner's and Amici's assertions otherwise are no more than second-guessing the expertise

of the Agency in defining the scope of a plant's operations.[11] EPA's interpretation of its own ambiguous regulatory term is entitled to considerable deference by this Court. Kentucky Resources Council, 467 F.3d at 993-94 ("Because the EPA's interpretation does not clearly subvert the language of [the regulatory provision], it warrants deference.").

C. EPA's interpretation of the term adjacent as applied to Summit's operations is consistent with longstanding Agency practice.

The reasonableness of EPA's analysis of adjacent in this case, which included concepts in addition to physical distance, is supported by decades of consistent interpretation of that term. See 58 Fed. Reg. at 42,767 (describing the practice of interpreting "on contiguous or adjacent property" under Title V). While the interpretations contained within other EPA applicability determinations and recommendation letters to permitting authorities are non-binding and limited to their factual circumstances, they nonetheless constitute a "body of experience and informed judgment to which courts and litigants may properly resort for guidance."

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[11] Neither Petitioner nor Amici offers any principled basis for determining, across these widely variant industrial practices, how "close" two emissions points must be to be considered a single source. API appears to consider distances of 4,500 feet as falling within the definition of "relatively close proximities," API Br. at 12, whereas Summit apparently considers points separated by no more distance than "across a highway or separated by a city block" to be suitably adjacent. Pet'r Br. at 40. In any event, none of these readings is compelled by the plain language of the regulation.

Alaska Dep't of Envtl. Conservation v. EPA, 540 U.S. 461, 487 (2004) (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)). Furthermore, courts "normally accord particular deference to an agency interpretation of longstanding duration." Id. (internal citation and quotation omitted). As EPA explained in its final October 18 determination, "EPA has historically interpreted the term to include concepts other than the physical distance between two facilities" and "has repeatedly included an evaluation of the nature of the relationship between the facilities and the degree of interdependence between them in determining whether multiple non-contiguous emission points should be considered a single source." J.A. 89. In the letter, EPA cited to, and the record contains, numerous examples of the application of the term "adjacent" in the same manner that EPA has applied the term here. See e.g., J.A. 133 ("Whether facilities are contiguous or adjacent is determined on a case-by-case basis, based on the relationship between the facilities."); J.A. 135 ("determining whether facilities are contiguous or adjacent depends not only on the physical distance between them but on the type of nexus (relationship) between the facilities"); J.A. 145-46 (concluding facilities are adjacent where "the platform and production operate as one facility as each is exclusively dependent on the other"); J.A. 162 ("A determination of "adjacent' should include an evaluation of whether the distance between two facilities is sufficiently small that it enables them to operate as a single source.").

Against this support for EPA's longstanding interpretation of the term adjacent, Summit and API argue, erroneously, that EPA rejected all reliance on a functional interdependence criterion in the 1980 PSD regulations. Pet'r Br. at 25, 42-43; API Br. at 18. The preamble to the 1980 PSD rules contains no such sweeping repudiation of the concept of functional interdependence. In fact, EPA explicitly sought to incorporate the concept of functional interrelationships into its new definition of a "source" under these regulations. EPA considered the merits of using the term "function" directly in its definition of a source, but concluded that evaluating whether a group of activities constituted a single source on the basis of their shared "function" would be administratively difficult and unpredictable. 45 Fed. Reg. at 52,695/1. EPA instead incorporated this concept by adding a reference to the standard industrial classification code to its revised source definition. Id. ("In formulating a new definition of 'source,' EPA [decided to] use a standard industrial classification code for distinguishing between sets of activities on the basis of their functional interrelationships."). EPA's conclusion that a stand-alone "function" criteria is undesirable does not equate to the conclusion that all other consideration of "interrelatedness" in determining the scope of a source is undesirable. Similarly, EPA's decision to incorporate the SIC code as part of the new definition of source did not foreclose consideration of information relevant to the interrelatedness of two emission sources aside from the SIC code. To the

contrary, consistent with the 1980 preamble and historic EPA practice, considerations of the relationship between emissions activities may, in some circumstances, override the requirement to share the same SIC code.[12] Thus, as Summit and AXPC acknowledge, EPA evaluates information about the interrelationships between emission activities above and beyond their shared SIC codes. Pet'r Br. at 27; APXC Br. at 14.

In adopting the final three criteria, EPA did not commit itself to the particular manner of application Summit and Amici urge the Court to require. EPA did state, and has frequently reiterated, that the three criteria should be applied to assure the definition of a source approximates a common sense notion of a "plant." 45 Fed. Reg. at 52,694-95; J.A. 56. As discussed above, the case-by-case consideration of the interrelatedness or interdependence of a series of emissions units in determining whether they are close enough to be treated as a single source is consistent with EPA's stated objective of treating all emissions points that comprise a single "plant" as a single source.

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[12] As set forth in the 1980 final PSD rules, one source may constitute a support facility for another and thereby be considered as part of the same industrial grouping even though these two facilities do not share the same SIC code. 45 Fed. Reg. at 52,695. The support facility analysis was not relevant to the determination of whether Summit's operations constitute a single source for permitting purposes, because all of Summit's emissions units fell within the same SIC code.

Perhaps recognizing their broad argument is unsupported by the 1980 final rule, Summit and APXC resort to a narrower, equally unavailing argument: EPA practice is ostensibly to consider the "functional interrelationship" of emissions sources *only* to determine whether emissions sources are part of the same industrial grouping. Pet'r Br. at 27; APXC Br. at 14. The proposition is plainly unsupported by the authorities cited. Summit relies on a guidance letter from EPA Region 5 to the Wayne County Department of Environment and a guidance memorandum issued by MDEQ Air Quality Division. J.A. 57; 58-59. While these documents lay out the kind of analysis necessary to determine if one source is a "support facility" to another, neither document says anything to the effect that information regarding the kind of relationship between the two sources is only relevant to *that* analysis. APXC relies on extra-record material to support its argument. APXC Br. at 14. Even if the Court considers the EPA Order and EPA response brief cited by AXPC, a full reading of those documents, rather than carefully selected excerpts, shows that they are not in conflict with, but instead firmly support, EPA's position here—that the interrelationship between emission sources may reasonably inform the adjacency criteria that EPA incorporated into its definition of a "source."[13] As explained above, the final PSD rule (and likewise, the final Title V

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[13] Tellingly, APXC fails to cite to the *immediately* subsequent sentence in EPA Region 8's brief to the Environmental Appeals Board that indicates that the Region

rules) promulgating the regulatory language in question do not constrain EPA's discretion to take into account any factor that reasonably informs whether a group of emissions activities are located on adjacent properties such that they may be treated as a single source; the documents cited neither purport, nor have the authority, to limit that discretion.

Accordingly, the Court should accord deference to EPA's historical interpretation of the term "adjacent" to include concepts in addition to distance and uphold the reasonable reading of the regulation applied to Summit's operations.

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did consider the interrelationship between emissions points in its analysis of the adjacency of those sources. EPA Resp. to Pet. For Review, In re BP America Production Company, Florida River Compression Facility, CAA Appeal No. 10-04 (EAB Feb. 23, 2011) at 17-18 ("the Region did in fact address the interrelatedness allegations… the Region assessed and responded to Petitioner's interrelatedness arguments to the extent they should be considered in the contiguous and adjacent portion of the source analysis…but found the interrelationship was not enough to make the various emission points contiguous and adjacent"). Similarly, APXC ignores the portion of the EPA Order indicating the state permitting authority determined the emission sources "did not have a unique or dedicated interdependent relationship and were not proximate and therefore were not contiguous and adjacent." EPA Order Denying Petition for Objection to Permit, In re Anadarko Petroleum Corp., Frederick Compressor Station, Pet. No VIII-2010-4 (July 14, 2010) at 10.

II. EPA'S DETERMINATION THAT SUMMIT'S OPERATIONS CONSTITUTE A MAJOR SOURCE IS REASONABLE AND SUPPORTED BY THE RECORD.

Summit claims that EPA has not fully articulated the reasoning or basis for its decision; further, that the decision is not consistent with provisions of the Clean Air Act; and finally that the decision is not adequately supported by the administrative record. Summit rests its claims largely on provisions of the Clean Air Act related to hazardous air pollutants that are not at issue in this case, state law provisions that are equally inapplicable, and EPA guidance that had been withdrawn prior to the October 18, 2010 determination. None of Summit's scattershot arguments have merit. EPA's October 18, 2010 letter clearly sets forth the regulatory factors that are the basis of its decision, cites to the relevant data relied upon in the decision, and explains EPA's reasoning and conclusion as to why each of the factors is met in this case. Furthermore, Summit's operations– where the wells, flares, and sweetening plant all work together toward the common and exclusive goal of producing gas for sale by Summit–is exactly the kind of operation that meets a "common sense" notion of a plant that underlies the regulatory definition of a title V major source. The decision thus easily meets the narrow and deferential standard of review called for under the APA. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983).

A. The October 18, 2010 letter contains the final agency action subject to review.

Summit suggests that the September 8, 2009 letter, in addition to the October 18, 2010 letter, contains a final agency decision. Pet'r Br. at 1, 13. This position is nonsensical – the letters contain the same determination, address the same operations, and impose the same obligation on Summit to obtain a Title V permit. The letters are not two separate final agency actions. EPA first issued a determination that Summit's operations constitute a "major source" in the September 8 letter, but then stayed the effect of that letter in order to obtain additional information related to the operations. The October 18 letter supersedes the effect of the September 8 letter, contains EPA's source determination in its final form, and is therefore the operable agency action subject to review.

Following this conclusion, a number of Summit's arguments fall to the wayside. Summit places great emphasis on the Wehrum Memorandum and spends much of its brief arguing that EPA's determination is inconsistent with that guidance. Pet'r Br. at 8-10, 38-40. However, the Wehrum Memorandum was not in effect at the time of the October 18 determination—as Summit readily concedes, and acknowledges that it received notice of the withdrawal prior to the final October 18 determination. Pet'r Br. at 11, 18. Any departure from the

methodology proposed in the Wehrum Memorandum in EPA's final determination is therefore inconsequential.[14]

B. Neither the hazardous air pollutants provisions of the Clean Air Act nor Michigan state law is relevant to EPA's determination that Summit's operations are a major source of nitrogen oxide and sulfur dioxides.

Although Summit concedes that "HAPs are not at issue in this case," it nonetheless emphasizes the statutory definition of a "major source" of hazardous air pollutants under the Clean Air Act and EPA's regulations establishing National Emissions Standards for Hazardous Air Pollutants as grounds for rejecting EPA's determination. Pet'r Br. at 36. The argument is an odd one; Summit appears to consider it arbitrary and capricious for EPA to treat different things – distinct statutory language and regulations that address different kinds of pollutants – differently. These statutory and regulatory provisions are only applicable to Summit's operations with respect to their emission of hazardous air pollutants, but they provide no persuasive force when used to evaluate a decision to aggregate emissions of other air pollutants.

[14] As explained further below, the Wehrum Memorandum does not mandate particular outcomes or require a permitting authority to adopt a particular methodology. Thus, even if the Wehrum Memorandum had been in effect at the time of the final agency action, EPA's decision was not in conflict with it and any failure to take the exact approach to applying that guidance that is endorsed by Summit would not be fatal to the reasonableness of EPA's final determination.

1. Section 112 of the Clean Air Act is irrelevant to EPA's analysis of Summit's operations.

In 1990, along with the new Title V program, Congress revised section 112 of the Clean Air Act, 42 U.S.C. § 7412, which regulates emissions of hazardous air pollutants. See National Mining Ass'n v. EPA, 59 F.3d 1351, 1352-53 (D.C. Cir. 1995). In discussing the new definition of a major source proposed under section 112, the Senate committee cautioned that the definition "will only apply in the context of this section and should not be confused with other meanings of the term 'major source' in parts C (prevention of significant deterioration) or D (non-attainment) of the Act." S. Rep. No. 101-228 at 150-51 (1989), reprinted in 5 Legislative History at 8490-91. As passed into law, Section 112 incorporates a definition of a "major source" of hazardous air pollutants that differs substantially from that under either section 302(j) or part D of Title I of the Act (42 U.S.C. §§ 7602(j) and 7501-15, respectively).[15] For example, a "source" under section 112 need only emit 10 tons per year of any hazardous pollutant to be considered major. 42 U.S.C. § 7412(a)(1). As relevant here, Congress also incorporated a provision that explicitly exempted oil and gas wells from the normally applicable

[15] Recall that the definition of a major source for purposes of Title V is a source that meets any of these three definitions, major source under section 112, major stationary source under section 302(j), or a major stationary source under part D of Title I. 42 U.S.C. § 7661(2).

aggregation requirements of that section. 42 U.S.C. § 7412(n)(4)(A); H.R. Rep. No. 101-490, pt. 1 at 338 (1990), reprinted in 2 Legislative History at 3362 (Section 112 "provides that emissions from oil and gas wells are not to be aggregated for purposes of this section."). No such exemption is provided in the definition of a major source under section 302(j) (applicable to sources of any air pollutants subject to regulation, including nitrogen oxide and sulfur dioxides). As explained in the legislative history, separate treatment of oil and gas wells was justified under this provision of section 112 because "[m]any oil and gas wells, and associated equipment and gas processing, may have generally low emissions of air toxics," such operations are "located in remote areas," and therefore "may not present a significant risk to human health." Id.

Given these statutory differences, it is not surprising that the regulatory definition of an oil and gas production "facility," which (together with the definition of "major source") provides the operable rules for aggregating emissions of hazardous air pollutants from such units under section 112, differs from the definition of a "major source" under Title V, which provides the operable rules for aggregating emissions of a group of sources that emit either HAPs or non-HAPs.[16]

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[16] The term "facility" is defined specifically with respect to oil and natural gas production facilities; the HAPs regulations provide distinct definitions for the operable source unit for certain HAPs source categories. For example, there is a

The definition of a "facility" that applies to oil and natural gas production facilities adopted in EPA's national emissions standards for hazardous air pollutants rules, 40 C.F.R. Part 63 subpart HH, reflects the aggregation exception provided for by Section 112(n)(4). 64 Fed. Reg. 32,610, 32,618 (June 17, 1999) ("One of the EPA's objectives was to develop a definition of facility that would comply with section 112(n)(4) of the Act"). Thus, the focus of that source determination analysis is on identifying the emissions sources that are on a single "surface site" (also defined within the regulation) and specifically precludes aggregation of equipment located on different oil and gas leases. 40 C.F.R. § 63.761.

As EPA explained in its initial response to Summit's request for an applicability determination, and again in the September 9, 2009 letter, each of the subsections in the definition of major source "provides a different test for Title V applicability" and EPA must apply the test relevant to the particular pollutant. J.A. 31-32; J.A. 54. Summit agrees that the emissions of nitrogen oxide and sulfur dioxides from its operations' trigger permitting obligations under Title V, rather than any HAP emissions from those operations. Nonetheless, Summit argues that EPA is required to use the same approach to defining a major source for non-HAPs pollutants under Title V as it uses in defining an oil or natural gas production

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separate definition of "plant site" applicable to off-site waste and recovery operations. See 40 C.F.R. § 63.681.

"facility" under section 112. "This argument warrants little discussion . . . . Different programs have different objectives and structures. EPA is not bound to any one definition of 'major source.'" National Mining Ass'n, 59 F.3d at 1358 (rejecting argument that EPA is required to use the same approach in defining "major source" pursuant to section 112 as that under Title V). The statutory text and policy considerations that bear relevance in defining the scope of a natural oil or gas production facility under the hazardous air pollutant regulations simply do not have any persuasive weight in the context of defining a major source for non-HAPs under Title V.

If the statutory language of section 112(n)(4) provides any guidance in determining the scope of a "major source" for non-HAPS, it cuts against Summit's arguments here and supports EPA's determination that Summit's operations constitute a single major source. Congress amended section 112 in 1990, after EPA had established decades of practice in source aggregation under the PSD/NSR program. One can fairly presume that Congress created the particular exception for oil and gas wells in light of those long-established practices. If the scope of a source is as narrow as Summit would have it and never comprised multiple wells spread throughout an oil or gas production field, Congress would have had no need to adopt the specific exemption to aggregation of oil and gas facilities provided in section 112(n)(4). Further, Congress elected to include this exception

only in section 112, not generally in the definition of a major source under Title V (which also was added as part of the 1990 CAA Amendments). In sum, EPA's determination here does not conflict with the language of section 112 of the Clean Air Act or the corresponding HAPs regulations—the best reading of these provisions indicates EPA's decision to aggregate Summit's operations accords with Congressional intent.

2. State law implementing federal regulation of hazardous air pollutants have even less relevance.

Summit also argues that Michigan's state laws implementing the federal Title V permit regulations are relevant in evaluating whether EPA's decision here is a sound one. Pet'r Br. at 37. Here, EPA, and not the state of Michigan, is the relevant permitting authority—a fact Summit does not dispute. The state operating permit regulations cited simply do not apply to EPA's consideration of Summit's operations. In any event, the Michigan rule Summit points to that is allegedly in conflict with EPA's decision in this case is a rule that applies specifically, and only, to hazardous air pollutants.[17] The exception in the state rule for the

[17] Rule 211(1)(a)(i), R.336.1211, which is quoted in part in Summit's brief, defines "a major source under section 112 of the Clean Air Act." Thus, the exception upon which Summit relies in this rule applies only in the context of determining whether a source is major for HAPs. The full text of the Michigan rule is available at Michigan Department of Licensing and Regulatory Affairs website:

aggregation of oil and natural gas production facilities is therefore no more persuasive than the same exception that applies under the federal hazardous air pollutant regulations.

C. EPA's determination is well supported by the record.

Despite the numerous citations to prior Agency determinations and guidance documents in the October 18 letter supporting EPA's analysis of the adjacency factor, Summit argues that the administrative record does not support EPA's major source determination because: (1) not one of those document clearly addresses the aggregation of emissions from gas wells and a downstream production facility; and (2) Summit views certain other source-specific determinations as inconsistent with EPA's decision here. Summit misunderstands the role the advisory letters to state permitting authorities and source-specific determinations included in the record play in supporting EPA's determination here. As discussed further below, EPA is not bound by these decisions, but may consider the reasoning of the decisions in applying the three regulatory factors to the specific operations at issue.

Moreover, the deferential standard of review of agency decision-making under the APA simply does not require the precise support Summit demands. EPA need not cite to a prior determination that closely parallels the facts at issue in this

http://www.state.mi.us/orr/emi/admincode.asp?AdminCode=Single&Admin_Num=33601201&Dpt=eq&RngHigh=

case in order to sufficiently support its decision; EPA need only "examine the relevant data and articulate a satisfactory explanation" for the determination "including a rational connection between the facts and the choice made." Motor Vehicle Mfrs. Ass'n, 463 U.S. at 43. The standard is easily met here; the October 18, 2010 letter clearly sets forth the regulatory factors that are the basis of EPA decision, the data that inform an analysis of those factors, and the agency's reasoning as to why each of those factors is met. Further, EPA interpreted the adjacency factor in a manner consistent with historic practice and provided support for this approach by citing to other determinations that applied similar reasoning.

In any event, EPA cited to and relied upon exactly the kind of support document Summit alleges is missing from the record. J.A. 91 n.29 (citing to BP Permit, J.A. 147). In support of its determination that a series of oil wells surrounding a production center (a series of "spokes" each connected to a central "hub") constitute a single source, the Alaskan permitting authority explained that such an approach both "maintains the important role of proximity in aggregation decisions" as well as fits the common-sense notion of a plant in the oil and gas industries. J.A. 151. The permitting authority elaborated that "due to the nature of oil and gas extraction business, facilities must be scattered across the resource area . . . [t]he hub and spoke model develops naturally from the logistics of business." Id. In other words, aggregation in the manner applied by both the Alaskan

permitting authority and EPA here appropriately responds to the particular nature of oil and gas extraction operations at issue in this case. As EPA stated in the October 18 letter, Summit's operations are similar to the hub and spoke model described in the Alaskan permitting authority's determination, and EPA's analysis here reasonably reached the same result as that permitting authority. J.A. 91 n.29.

Secondly, the determinations cited by Summit do not undermine the reasonableness of EPA's determination that Summit's operations constitute a "major source" of air pollutants regulated under title V. The two documents discussed at greatest length by Summit are responses from the Colorado permitting authority to public comments related to permits for two different sources, the Conn Gas Treating Facility and the Gunnison Energy Ragged Mountain Compressor Station.[18] J.A. 111, 119. Rather than conflict with EPA's determination that Summit's emissions activities are adjacent, the reasoning in these documents

[18] Summit also cites to additional documents that provide little or no support. The first is a document issued by the Colorado Department of Health. Pet'r Br. at 29. This document articulates an approach to aggregation applied to sources of hazardous air pollutants, not non-HAPs pollutants, and is irrelevant. J.A. 66-69. The second document cited by Summit is a determination letter to the owner/operator of an oil and gas production field. While the letter indicates that the production field occupies approximately 12 miles in radius, the letter does not include interpretation of the specific terms "contiguous or adjacent properties," nor does it discuss either the interrelationship or the distances between particular emission points. The letter provides little reasoning that EPA could use as a point of reference to this case, other than the ultimate outcome. J.A. 69-70.

supports the approach followed in the October 18 letter. In those two documents, the permitting authority also concluded that interdependency is an appropriate factor to consider in the adjacency analysis, although it "may have reduced relevance to an agency determination." J.A. 115, 124. Nevertheless, the permitting authority went on to evaluate the interdependency of the gas gathering system and the gas treatment plant in deciding whether those emissions activities are located on adjacent properties. The permitting authority explicitly concluded, unlike here, that the information submitted by the owner/operator "demonstrates a lack of interdependency between the [gas treatment plant] and nearby emissions sources." J.A. 116, 126. The permitting authority summarized its assessment of the case-by-case determinations as indicating that "there must be a high level of connectedness and interdependence between two activities for them to be considered contiguous or adjacent." J.A. 117. The authority noted that, as a general rule, upstream oil and gas activities (such as well production) are not reliant on only one midstream facility (such as a gas processing plant), but that typically there are many midstream facilities to which an operator may direct oil and gas production. Id.

However, that "atypical" situation to which the Colorado permitting authority referred is precisely the factual situation at the Rosebush facility. As EPA stated in its October 18 2010 determination letter, "the wells provide all their

sour gas to the sweetening plant, the sour gas cannot flow anywhere else, and Summit owns and operates the sweetening plant and well sites." J.A. 91. If anything, the determinations cited by Summit bolster EPA's position that its decision here is reasonable and consistent with longstanding practice.

III. THE APA DOES NOT REQUIRE EPA TO PROMULGATE AN INTERDEPENDENCE CRITERION THROUGH NOTICE AND COMMENT RULEMAKING.

In an attempt to avoid the deference properly granted to EPA's interpretation of the definition of a major source, Amici argue that EPA was required to promulgate a separate interdependence or interrelatedness criteria through notice and comment rulemaking before relying on this factor in its analysis of Summit's operations. API contends that the case-by-case determinations have slowly morphed the contiguous and adjacent criterion into an "interrelatedness" factor such that EPA "essentially and illegally has rejected proximity as any serious consideration in source determinations." API Br. at 14-15, 21. APXC argues that the Court should not defer to EPA's interpretation as applied here because the McCarthy Memorandum has added a "fourth factor" or "new substantive addition" without the required APA notice and comment procedures. APXC Br. at 17-27. In the first instance, the Court need not address an argument raised only by an amicus. Second, the Court lacks jurisdiction over a challenge to the McCarthy Memorandum, which is neither "final" nor "locally or regionally applicable"

agency action. 42 U.S.C. § 7607(b)(1). Even if the Court does consider these claims, neither version of the argument has merit, as it "runs against a long-settled principle of federal administrative law [that] [a]n agency's enforcement of a general statutory or regulatory term against a regulated party cannot be defeated on the ground that the agency has failed to promulgate a more specific regulation." United States v. Cinemark USA Inc., 348 F.3d 569, 580 (6th Cir. 2003). Moreover, Amici's characterization of EPA practice as having effectively eliminated all consideration of proximity is unsupported; EPA's determination here is consistent with decades of interpretation of the term adjacent to include considerations of proximity *and* interdependence.

A. Amici's APA claims are additional claims not raised by Summit that need not be considered by the Court.

An amicus plays a limited role in a case that is not the same as that of a real party in interest. United States v. State of Michigan, 940 F.2d 143, 165 (6th Cir. 1991). Consistent with this limited role, an amicus may not introduce an issue into a case or request relief that is not raised or requested by the parties. Cellnet Commc'n, Inc. v. F.C.C., 149 F.3d 429, 443 (6th Cir. 1998) ("While an amicus may offer assistance in resolving issues properly before a court, it may not raise additional issues or arguments not raised by the parties."); Eldred v. Reno, 239 F.3d 372, 378 (D.C. Cir. 2001) ("amicus constrained 'by the rule that [it] generally

cannot expand the scope of an appeal to implicate issues that have not been presented by the parties to the appeal'") (quoting Resident Council of Allen Parkway Vill. v. HUD, 980 F.2d 1043, 1049 (5th Cir. 1993)).

Summit has not raised the argument that EPA's October 18, 2010 determination or the guidance documents relied on in issuing that determination failed to comply with the notice and comment rulemaking requirements of the APA. Accordingly, the issue is not before the Court and need not be addressed. In any event, even if the Court were to consider Amici's APA claims, those claims should be dismissed for lack of jurisdiction or denied on their merits.

B. This Court lacks jurisdiction to hear Amici's claims.

To begin with, non-binding guidance documents such as the McCarthy Memorandum are policy statements, not rules, and therefore do not constitute "final" agency action that is reviewable under the APA or the special judicial review provisions of the Clean Air Act. See, e.g., Catawba County v. EPA, 571 F.3d 20, 33-35 (D.C. Cir. 2009). Moreover, assuming, *arguendo*, that the McCarthy Memorandum was a reviewable final agency action, it certainly is not a locally or regionally applicable action over which this Court has jurisdiction. Nothing in the Memorandum purports to limit its scope to any particular locality or region in the country; accordingly challenges to the Guidance could, in any event, only be brought in the D.C. Circuit. 42 U.S.C. § 7607(b)(1); Am. Petroleum Inst.

v. EPA, No. 09-1085, 2010 U.S. App. LEXIS 5744 at *3 (D.C. Cir. Mar. 15, 2010).

C. EPA's application of the "contiguous or adjacent" factor to Summit's operation does not violate the APA.

Amici's suggestion that the interrelatedness of emissions units cannot be considered by EPA unless an interrelatedness factor goes through notice and comment rulemaking is misguided. An agency is not compelled to employ substantive rulemaking in every instance in which it seeks to identify how a statute or regulation will apply to a specific set of facts. See SEC v. Chenery Corp., 332 U.S. 194, 202-03 (1947) ("[n]ot every principle essential to the effective administration of a statute can or should be cast immediately into the mold of a general rule. . . . the agency must retain power to deal with the problems on a case-to-case basis"); NLRB v. Bell Aerospace Co., 416 U.S. 267, 274-75 (1974). While notice and comment sometimes is required where an agency "adopt[s] a new position" that is "inconsistent with" the existing regulation, Shalala v. Guernsey Mem'l Hosp., 514 U.S. 87, 100 (1995), such is clearly not the case here since, for all the reasons stated above, the agency's decision here is entirely consistent with applicable regulations.

This Circuit rejected an argument similar to Amici's in Cinemark, 348 F.3d at 580. There, Cinemark USA Inc. argued that the Department of Justice's

interpretation of a particular provision of its own regulation to include quantitative requirements imposed new obligations that were not required by a plain reading of the provision, and those new requirements should have been promulgated through the APA's notice and comment procedures. Id. The Cinemark court found the argument unpersuasive, contrary to established principles of federal administrative law, and concluded that if the agency action is warranted by the statute and regulation, "then (under *Chenery* and *Bell Aerospace*) nothing in the APA requires additional rulemaking." Id.

As stated in the October 18, 2010 letter, EPA's consideration of "the nature of the relationship between facilities and the degree of interdependence between them" in determining whether Summit's operations constitute a single source is an application of an existing interpretation of the regulatory terms "located on contiguous or adjacent properties." J.A. 89. If EPA is correct that the definition of a major source, as set forth in the PSD rule and the Title V rules, fairly encompasses consideration of the interrelationship between emissions sources, the APA imposes no additional requirement to establish that interpretation through rulemaking. Cinemark, 348 F.3d at 580. EPA need not have specified in its final Title V rule each and every factor that may be informative to determining in a specific case whether a group of emissions activities constitutes a single source.

D. None of the guidance documents cited by EPA provides a rule of general applicability binding its analysis of "adjacent" in this instance.

The APA requires notice and comment for new substantive rules, but imposes no such requirement on either policy statements or interpretive rules. See 5 U.S.C. § 553(b)(3)(A); Dismas Charities, Inc. v. United States DOJ, 401 F.3d 666, 679 n.8 (6th Cir. 2005). An agency policy statement does not seek to impose or elaborate or interpret a legal norm, but instead informs the public of a current enforcement or adjudicatory approach. Syncor Int'l Corp. v. Shalala, 127 F.3d 90, 94 (D.C. Cir. 1997). "The primary distinction between a substantive rule–really any rule–and a general statement of policy, then, turns on whether an agency intends to bind itself to a particular legal position." Id. As between substantive (or so-called legislative) rules and interpretive rules, the former create law, while the latter "merely clarify or explain existing law or regulations and go to what the administrative officer thinks the statute or regulation means." Dismas Charities, Inc., 401 F.3d at 679 (internal quotation and citation omitted).

In the October 18, 2010 letter EPA explained that it followed guidance provided in the McCarthy Memorandum in making its determination that Summit's operations constitute a single source. J.A. 87. EPA also cites to several prior guidance letters from EPA regional offices to state permitting authorities in support of its analysis of the adjacency of Summit's emission sources. J.A. 89

n.13, n.14, n.18. While each of these non-binding documents supports the method of analysis used in EPA's final source determination, none of the guidance relied upon provides EPA with a substantive rule of decision. EPA retains the discretion provided by the Clean Air Act and its Title V regulations to consider the relationship between emission sources in issuing a source determination to the extent warranted by the factual circumstances; the McCarthy Memoranda and advisory letters do not, by intent or in effect, alter that discretion. Accordingly, none of the guidance relied upon is subject to APA's requirements of notice and comment rulemaking.

1. The McCarthy Memorandum imposes no substantive change to EPA's discretion under its Title V regulations.

In its very first sentence, the McCarthy Memorandum makes clear that its purpose is to withdraw the Wehrum Memorandum. J.A. 55. Rather than offer any new substance to the relevant legal norms or a new interpretation of the definition of a "source," the guidance merely indicates permitting authorities "should [] rely on the three regulatory criteria for identifying emissions activities that belong to the same 'building,' 'structure,' 'facility,' or 'installation.'" J.A. 56. The Memorandum offers no further explication and mandates no outcome as to how to apply these factors beyond that originally provided for in the preamble of the 1980 final PSD/NSR rules: "[i]n applying these criteria, permitting authorities should

also remain mindful of the explanation we provided in the 1980 preamble." J.A. 56. On its face, the Memorandum does not bind the Agency to any legal position other than that already articulated by the rules themselves, and is a quintessential example of a general policy statement.

Nor does the McCarthy Memorandum effectively adopt a new interpretation inconsistent with a prior, authoritative interpretation by rejecting the simplified approach to source aggregation set forth in the Wehrum Memorandum. See Paralyzed Veterans of Am. v. D.C. Arena L.P., 117 F.3d 579, 587 (D.C. Cir. 1997) (not a violation of APA for an agency to adopt a contradictory interpretation where it did not clearly commit itself to the initial interpretation). The Wehrum Memorandum itself did not purport to limit EPA's discretion to consider factors such as interdependence in determining whether a series of emissions units constitutes a single source, and ultimately concluded that "[w]hether or not a permitting authority should aggregate two or more pollutant-emitting activities into a single major stationary source for purposes of NSR and Title V remains a case-by-case decision considering the factors relevant to the specific circumstances." J.A. 37. The Wehrum Memorandum suggested a simplified method of applying the three regulatory factors and provided support as to why that approach is a reasonable approach, but ultimately did not require permitting authorities to adopt that approach. The McCarthy Memorandum reflects a shift in the agency's

position as to the reasonableness of that approach, but does not foreclose a permitting authority's discretion to conclude, after reasoned analysis, that "proximity" is the "overwhelming factor" in the source determination decision. J.A. 56. Thus, nothing in either the Wehrum or McCarthy Memoranda binds the agency to a particular outcome beyond that required by the NSR/PSD and Title V rules themselves.

2. The recommendation letters issued to permitting authorities are fact-specific, non-binding, and do not commit EPA to a particular legal position.

The advisory letters cited in the October 18, 2010 letter contain, like the agency action at issue here, fact-specific analyses and determinations that apply only to particular sources. To the extent these letters have any binding effect at all, it is limited to the owner or operator of the source who requested the determination.[19] Thus, the determinations in these letters are not legislative rules, regulatory interpretations, *or* policy statements; they are decisions in source-specific *adjudications*. See e.g., United States v. E. Ky. Power Co-op., 498 F. Supp. 2d 976, 984 (E.D. Ky. 2007) (EPA "applicability determination [is] akin to an adjudicatory order."). While such decisions may be persuasive to other

[19] Many of the letters are merely recommendations from EPA to a state permitting authority and are not legally binding even upon the source requesting them.

permitting authorities, and are properly cited as support for the reasonableness of a particular methodology, they do not bind those agencies to follow a similar approach or to reach the same outcome. See McCarthy Memorandum, J.A. 56. ("[W]hile informative of the necessary analytic process, no single determination can serve as an adequate justification for how to treat any other source determination.")

API's urging that EPA has "impermissibly replaced its published interpretation of contiguous or adjacent . . . with a contrary interrelatedness test developed through informal opinion letters" misunderstands both the effect of the cited letters and is belied by the record in this case. API Br. at 21. While EPA disagrees with API's characterization of the case-by-case determinations as effectively rejecting any "serious consideration" of proximity, the Court need not decide the matter. API's concerns that certain source determinations unjustifiably stretch the definition of a source is irrelevant to the matter before this Court—whether *Summit's* operations reasonably fall within the definition of a major source. As addressed at greater length above, EPA's decision in this case is properly based on all three regulatory criteria and reasonably takes into account the distances, the physical linkages, *and* the operational interdependence of Summit's different emissions units in order to determine that these units are located on adjacent properties that constitute a single stationary source. In sum, none of the

arguments raised exclusively by Amici challenges the reasonableness of EPA's determination subject to review here.

CONCLUSION

For the foregoing reasons, the Petition for Review should be denied.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,930 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Office Word in Times New Roman 14.

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CERTIFICATE OF SERVICE

I hereby certify that on the date below the **BRIEF FOR RESPONDENTS UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and LISA JACKSON, Administrator** with all attachments was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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